United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4235-4269

ORIGINAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

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Petitioner,

v.

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Respondent.

ON APPLICATION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

UNITED STATES COURT OF APPEALS
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Statement of Issues Presented

1. Whether Section 8(b)(4)(B) prohibits work stoppages by employees whose contracts have expired.

2. Whether Respondent's work stoppage was engaged in to force the Board of Education to terminate existing jobs or existing construction contracts.

3. Whether Respondent may lawfully engage in a work stoppage to obtain a layoff plan to preserve its members' jobs.

4. Whether Section 8(b)(4)(ii) is applicable to work stoppages.

5. Whether Section 8(b)(1)(B), which prohibits any interference with an employer's selection of his agent for bargaining and adjusting grievances, is applicable to this case and was violated by Respondent.

Statement of the Case

The Board's Statement of the Case is accurate except that the Board's Decision reported at 220 NLRB No. 57 was decided by Members Fanning, Jenkins and Penello and the Board's Decision reported at 220 NLRB No. 117 was decided by Chairman Murphy and Members Fanning and Jenkins, and that the events which confer jurisdiction upon this Court are not conceded to constitute unfair labor practices.

Misleading Statements in the Board's Brief

1. The Board states as a finding of fact (Brief, p. 3, See pp. 6-8) that the facts "involve attempts during 1974 by Local 3 to monopolize for its members all electrical construction work within New York City". This startling statement is based upon two facts—that Respondent allegedly pressured *one* government agency—Board of Education—to cease doing business with two contractors, Wickham-Perone, Joint Venture, and Iovine, and that Respondent pressured *one* of these contractors, Wickham Contracting Co., Inc. to withdraw from a multi-employer bargaining association which had at least seventy-four members, whose names are known to the Board! The

publication of such a sweeping irresponsible conclusion based upon these facts passes understanding, particularly in view of the Board's knowledge of the pending jury trial before Judge Frankel of Wickham-Perone's civil suit for damages pursuant to Section 303 of the Act based upon Respondent's alleged violations of the Act.

2. The Board states (Brief, pp. 3-4) that the Board found and concluded that an object of Respondent's strike was "to pressure the Board of Education to cease doing business with electrical contractors not affiliated with Local 3" and "whose employees were not Local 3 members". The Board's actual finding and conclusion, respectively (J.A. 29) was more complex—namely, "with an object of requiring the electrical contractors employing Local 3 members to cease doing business with the Board of Education to force the Board of Education to cease doing business with the electrical contractors Wickham and Perone . . .".

3. The Board stated (Brief, p. 9) that the work stoppage resulted "in the shutdown of most of the School Board's major jobs". School Board Director McLaren testified that "we were getting tied up in practically most of our major jobs" and that "naturally I am thinking about the thing. I've got 120 jobs under construction which is going to go ahead and be shut down" (J.A. 195, 200).[1] The Administrative Law Judge and the Board converted projected shutdowns into accomplished fact.

4. The Board states (Brief, p. 10) that Van Arsdale expressed concern about the Wickham-Perone and Iovine school jobs and "claimed that Wickham-Perone was not paying the prevailing wage rate". The Record shows that Van Arsdale voiced his concern for his members' job se-

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[1] "J.A." refers to the joint appendix of relevant record materials printed pursuant to a stipulation of the parties.

curity in a general way, that he asked who was performing certain jobs and McLaren identified Wickham-Perone to Van Arsdale; that Van Arsdale did not claim that Wickham-Perone was not paying prevailing wage rates and said nothing about Iovine or Iovine's project, but McLaren called to Van Arsdale's attention that Iovine had been awarded work (J.A. 198-199).

5. The Board erroneously implies (Brief, pp. 14-15) that Respondent's Business Manager Van Arsdale's first demand for "a layoff plan or list" which would be nondiscriminatory in effect was on August 20, 1974. Board of Education Director McLaren knew on July 19, 1974 and Doctor Gifford knew on July 25, 1974 (J.A. 201, 217, 290-291) that Van Arsdale had had consultations about a layoff plan with their attorney, New York City Deputy Corporation Counsel Buxbaum before Van Arsdale had spoken with them. The Record is bare of any evidence that Buxbaum issued an opinion with respect to the legality of such layoff plan[2] (J.A. 290).

6. The Board states (Brief, p. 19) that in early October, 1974, during the picketing of the Wickham-Perone office, "although no Wickham employees were then on strike, some of the signs carried by the pickets stated Wickham employees were on strike". Administrative Law Judge Plaine refused to permit cross-examination of Biele with respect to the Wickham strike on the ground that it occurred after the time frame of the Complaint before him—which was dated September 6, 1974 (J.A. 186-188, 315). That testimony, assumed to have been uncontroverted, would have proved that the Wickham employees whom Respondent allegedly sought to replace were Respondent's adherents. This refusal to permit cross-examination constituted a breach of due process. At the hearing before

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[2] The Record is complete with respect to this omission. To this day Buxbaum has failed to issue such opinion.

Judge Schlezinger, Biele admitted that during the period of his dispute with Respondent. his work force of electricians decreased from 40 or 50 to approximately 10, and that three employees resigned, none in writing (J.A. 348-350).

7. The Board's account (Brief, p. 16) of the events of the Board of Education Public Hearing held on October 16, 1974 is incomplete. The Board omitted Respondent's reference to the State Department of Labor's deregistration proceeding which involved Wickham's apprentices; omitted the School Board's statement that if Respondent's allegations were found to be true, Wickham would be suspended from its job; omitted Administrative Law Judge Plaine's refusal to allow production of the tape of that Hearing and his barring of cross-examination with respect to Wickham's contract and his apparent recognition that for due process reasons "I probably made a fatal mistake yesterday in allowing General Counsel to go in this direction * * *." (J.A. 276-277, 278, 210-213).

POINT I

The Congress did not intend to make illegal any work stoppage by employees whose contract had expired.

The Board has cited no instance, during the history of Section 8(b)(4)(B), where, as here, that Section was held to apply to a situation where the work stoppage began after the employee's collective bargaining agreement had expired.

The Act sets forth only one type of situation (Sections 206-210) during which employees whose contract had expired may be enjoined from engaging in a work stoppage. Such injunction requires publication of a report by a Board of Inquiry appointed by the President of the United

States, stating that a strike affecting the entire industry or substantial part thereof would imperil the national health and safety, the President's direction to the Attorney General to petition a District Court for a temporary injunction, a second published report by the Board of Inquiry after 60 days, and a secret ballot by the National Labor Relations Board of the employees' wishes within 15 days thereafter, following which the injunction must be discharged promptly.

In the light of these strict statutory limitations upon injunctions against work stoppages by employees the expiration of whose contract results in a certified national emergency, any interpretation of Section 8(b)(4)(B) which results in enjoining a work stoppage by employees whose contract had expired which does not cause a national emergency, surely is unreasonable.

The Board relies upon the facts (Brief, p. 27) that "the statutory prohibitation against secondary activity is not premised upon a contractual no-strike provision" and that the Respondent's work stoppage was selective and was confined to Board of Education sites. The Board misconceives our point. We agree with the Board that whether a "contractual no-strike provision" was in effect is irrelevant; otherwise unions would be immune from the effect of Section 8(b)(4)(B) so long as their contracts did not contain no-strike clauses. At issue here is something quite different. The issue is the right of employees to say "no contract, no work", or, in the words of the Thirteenth Amendment of the Federal Constitution, no "involuntary servitude".

With respect to the Board's reliance upon the selectivity of the work stoppage, we respectfully urge that during a period of collective bargaining after a contract has expired the employees may choose to work or not to work, and they owe no accounting for their failure to work. Were this Record to show that the other terms and conditions of

employment had been negotiated and that Respondent nevertheless refused to sign a contract until the employers agreed to cease doing business with the Board of Education, such refusal might well have constituted an illegal refusal to bargain in violation of Section 8(b)(3) of the Act, which would have been enjoinable. The Record is bare of any facts of that nature.

More surprising is the Board's implicit contention that the post-contract work stoppage was illegal because it was not total. Surely the Board does not intend to encourage widespread post-contractual shutdowns of construction by suggesting that unions thereby would escape findings that their work stoppages are illegal.

Absent any citation of authority holding that a work stoppage may be illegal when the employees have no contractual duty to work, we respectfully urge that this Court not construe Section 8(b)(4)(B) to that effect.

POINT II

The work stoppage was for a primary work preservation agreement, hence was lawful.

The United States Supreme Court in *National Woodwork Manufacturers Association* v. *NLRB,* 1967, 386 U.S. 612 and in *Houston Installation Contractors Association* v. *NLRB,* 1967, 386 U.S. 664, held that a union may order a work stoppage to enforce a work preservation agreement, because such stoppage was primary. The Supreme Court in *National Woodwork* quoted Senator Taft's statement that Section 8(b)(4)(B) makes unlawful secondary boycotts "to injure the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees." (Emphasis ours)

The Supreme Court defined "primary" even more broadly in *Houston Installation, supra* by holding that a

sister local may lawfully cause a work stoppage in support of a clause providing that an employer will not contract out certain work belonging to employees who are members of their sister local.

The Board seeks to convert the "wholly unconcerned" test of neutrality enunciated in *National Woodwork* and *Houston Installation* into an employer-employee relationship test (Board's Brief, p. 27).

The Board's principal device employed in its effort to minimize the impact of *National Woodwork* is its "right of control" test, which merely requires determination of whether the party upon whom the Union exerted pressure has the power to satisfy the Union's demands. Even applying this "right of control" test, the Board of Education is a primary because the School Board had the power to employ all of its construction electricians directly as well as merely to restrict the manner of their employment by contractors by adding a layoff plan to its job specifications. It appears, however, that only the Fourth Circuit has upheld the Board's right of control test. *George Koch Sons* v. *NLRB,* 490 F 2d 323. At least five circuits have rejected this test. The Second Circuit has not ruled upon the effect of *National Woodwork* upon the right of control test, and left this issue open in *Danielson* v. *I.B.E.W., Local 501,* 509 F 2d 1371. The effect of *National Woodwork* upon the right of control test is now before the Supreme Court in *NLRB* v. *Enterprise Association, etc., Plumbers Local Union No. 638,* Docket No. 75-777.

The Board's reference (Brief, p. 24) to *Allen Bradley Co. et al.* v. *Local Union No. 3, IBEW et al.,* 325 U.S. 797, (1945) is misplaced. As the Supreme Court in *National Woodwork* noted, the boycott in *Allen Bradley* was carried on "not as a shield to preserve the jobs of Local 3 members, traditionally a primary labor activity, but as a sword to reach out and monopolize * * *." 386 U. S. at

630. The layoff plan which Van Arsdale pressured the School Board to require bidding contractors to adopt clearly is "a shield to preserve the jobs of Local 3 members, traditionally a primary labor activity * * *."

The Board argues (Brief, p. 27) that Respondent's objective of seeking to achieve a layoff plan from the Board of Eduaction was invalid because the Union "failed to establish that any primary relationship existed between it and the Board of Education", hence the work stoppage was not "in furtherance of a primary labor dispute". This conclusion is erroneous.

Congress did not define the terms "primary", "secondary", or "relationship". The First Circuit has stated, in a situation where no relationship between the Union and a Department of Education was alleged to exist, that the Union's dispute with a government agency concerning its contract policy might constitute matters in legitimate, primary dispute. That Court stated:

> "Whether the union picketing of the Department violated the Board's order is another matter. There are two complicating factors. In the first place, the words 'threaten, coerce, or restrain', apparently have never been defined where the object is a public agency. The Department of Education has no customers. The appeal might be found to have been only to officials of the Department and the general public. Secondly, we do not find the objective of this picketing entirely clear. The union claims that procedures used in choosing the contract cleaners who would be asked to submit bids, and the Department's policy of not requiring contractors to comply with any minimum wage and benefit standards, were unfair to it. At least taken by themselves these might be matters in legitimate, primary dispute between the union and the Department. On the other hand, these questions were raised only when the award of a contract to University was im-

> minent, and this award was concededly, at least in part, what the union was attempting to prevent." *NLRB* v. *Building Service Employees Local 254* (CA 1 1967), 376 F 2d 131, cert. den. 389 U.S. 856.

As contractor the Board of Education's contacts with the school electricians are more substantial and frequent than their contacts with their employers (J.A. 307-308, 312) whether or not this relationship has employer-employee characteristics.

Whereas in *Building Service Employees* the award which the Union sought to prevent was "imminent", Respondent herein sought to retain work for its members by demanding promulgation of a layoff plan applicable to *future* contracts.

No court has held that Congress intended to incorporate by reference into Section 8(b)(4) the Internal Revenue Service tests determining employer-employee relationship. The school electricians herein have been on the payrolls of numerous electrical contractors, while continuing to work on Board of Education projects. The Board of Education controls completely the electrical work in contracts containing hundreds of specifications. As contractor, the Board of Education's contacts with these electricians are more frequent and substantial than their fleeting and evanescent relationship with their employers, whether or not their relationship with the Board of Education includes employer-employee characteristics (J.A. 307-308, 312). Furthermore, Respondent represents the seventy electricians who were employed directly by the Board of Education with respect to the resolution of their grievances, and would represent the construction electricians at the school sites if the Board were to exercise its option to hire them directly rather than through contractors (J.A. 214-216).

The Board itself, in its third decision relating to Respondent's work stoppage, noted that "a sharp controversy exists over whether the Board of Education or Iovine

is the employer that controls the assignment of the disputed work. In our judgment, it is unnecessary to resolve this issue * * *." The Board held that Respondent could not have violated Section 8(b)(4)(D), the jurisdictional dispute section, because "if in fact, the Board of Education is deemed to be in control over the assignment of the work alleged in dispute", the School Board, being a government agency although a "person", was not an "employer" within the meaning of the Act. (*Eugene Iovine, Inc.*, 219 NLRB No. 99, Members Fanning, Jenkins and Kennedy.)

The Board also found that the electrical contractors whose employees engaged in a partial work stoppage were "secondary" or "neutral" employers (J.A. 29, Board's Brief, p. 25). These very electrical contractors were primaries, however, in that disputes with Respondent prevented the renewal of their collective bargaining agreements. No legislative history and no Board decision, we believe, supports this implication that an employer simultaneously can be a primary and a secondary within the meaning of Section 8(b)(4). This conceptual anomaly may in part explain the absence of any previous decision holding that a work stoppage of employees whose contract had expired may violate Section 8(b)(4)(B).

POINT III

The work stoppage did not have an object of forcing the Board of Education to cease doing business with Wickham-Perone.

Section 8(b)(4)(B) is violated whenever an object of a work stoppage or threat is "forcing or requiring any person . . . to cease doing business with any other person". The Board argues (Brief, pp. 27-28) that even if the layoff plan demanded by Respondent was a subcontracting agreement which is lawful under Section 8(e) of the Act, as Respondent urges, the attempt to secure such

plan would violate Section 8(b)(4)(B) "where, as here, pressure is applied to *force non-union contractors off existing jobs* or to force the signatory's compliance with the 8(e) agreement once obtained (citations omitted). Clearly then, as the Board found, the issue of the legality of the layoff plan under Section 8(e) of the Act is irrelevant to the propriety under Section 8(b)(4)(i)(ii)(B) of the Union's efforts to force the Board of Education to *dishonor its existing contract* with non-Local 3 contractors." (Emphasis ours)

The Board's statement of part of the applicable law is correct. The Board does not state, but does not deny, that the construction industry may legally exert economic force to obtain a subcontracting agreement. *Orange Belt District Council* v. *NLRB* (CA D.C., 1964) 328 F. 2d 534; *Essex County Carpenters* v. *NLRB* (CA 3 1964) 332 F. 2d 636. The Record is bare, however, of evidence that Respondent sought to force Wickham-Perone off existing jobs or to force the Board of Education to dishonor its existing contracts.

Board of Education Director McLaren admitted that Respondent's expressed exclusive concern was with future jobs, as follows:

> "Q. Now, on July 19 when you talked with Mr. Van Arsdale, did you in any way tell him that you were going to have telephone calls made to Mr. Biele or Mr. Iovine?
>
> A. No. I did not.
>
> Q. Did you in any way mention to Mr. Van Arsdale that you were going to send letters out to these gentlemen telling them to leave their jobs?
>
> A. No, I did not.
>
> Q. Fine. Is it true that on July 19 Mr. Van Arsdale told you that he wanted assurances from the Board of Education with respect to the future work of the Board of Education, and I underline the word future?

A. Yes, I will say that that is pretty much what his words were, he was talking future work.
Q. Future work, fine." (J.A. 217-218)

The Board's own account (Brief, p. 10) of Van Arsdale's demand to McLaren does not set forth any alleged request by Van Arsdale that McLaren stop any existing jobs, but rather sets forth a request for job security. The decision to stop Wickham-Perone was exclusively McLaren's, upon his consultation with two of his attorneys (J.A. 202).

Further proof that termination of Wickham-Perone's existing contracts were not an object of the work stoppage was the fact that the removal by McLaren of Wickham-Perone from their Board of Education jobs had no effect whatsoever on the work stoppage (J.A. 218-219). Clearly the removal of Wickham-Perone constituted McLaren's attempt temporarily to deflect Respondent's demand for job security for those members who are school electricians, and is not attributable to Respondent's demands.

Further proof that Respondent at no time made any demands relating to existing jobs or existing contracts and was concerned solely with a layoff plan applicable to future contracts was kept out of the Record when the Administrative Law Judge quashed subpoenas served upon four members of the Board of Education on grounds of harassment and the cumulativeness of their testimony.

The purpose of the four subpoenas which were quashed was to elicit from each of the members of the Board of Education the content of Van Arsdale's separate conversations with them during the summer prior to the formal meeting of August 20, 1974, in order to establish that Van Arsdale never expressed or implied a cessation-of-business demand and was concerned only with future contracts.

At the very moment that the subpoenas were quashed the four witnesses all were attending scheduled Board of

Education meeting three blocks from the Hearing Room, the NLRB hearing having been rescheduled for the purpose of accommodating these anticipated witnesses (J.A. 296-299, 328-329).

The Board's decision (J.A. 35) does not seek to justify the quashing of the subpoenas, but states that Respondent was not deprived of due process because the Administrative Law Judge relied upon other evidence. We respectfully urge that if the testimony of those four members of the Board of Education, proffered by offer of proof, that Van Arsdale's exclusive concern was for a layoff plan applicable to future jobs indeed was "cumulative", then the Administrative Law Judge should have found that his demand did not relate to existing jobs. If the substance of this proffered testimony had not been established to the satisfaction of the Administrative Law Judge then it was not cumulative and he should not have quashed the four subpoenas.

Even absent the testimony of the four members of the Board of Education, which group the NLRB alleges were "pressured"—and particularly if the testimony is deemed "cumulative"—the Board's conclusion that Respondent's work stoppage had an object of stopping Wickham-Perone's existing jobs is totally unjustified. Absent such a conclusion, the conclusion that Respondent violated Section 8(b)(4)(B) must fall.

POINT IV

No evidence supports the finding that Respondent violated Section 8(b)(4)(ii).

The Board found, without comment, that Respondent's work stoppage, which was unaccompanied by picketing, violated not only Section 8(b)(4)(i) but also Section 8(b)(4)(ii), which makes it an unfair labor practice "to threaten, coerce or restrain . . ." for a prohibited purpose.

The Board's Statement of Issues Presented (Brief, p. 2) implies that the inducement of a work stoppage in violation of (i) also constitutes *ipso facto* a violation of (ii).

The usual impact of adding an (ii) violation to an (i) violation is nil, since an injunction is the consequence of either violation. The jury trial here impending prompts this argument that a Finding that Respondent committed threats, coercion or restraint is erroneous. True it is that every refusal to conclude a work stoppage could be interpreted as having a coercive or restraining effect. But would not such construction of "threaten, coerce or restrain" render it mere surplusage? No court, we believe, has explicitly held that a mere work stoppage constituted threats, coercion or restraint in violation of Section 8(b)(4)(ii), and no legislative history supports such construction. We respectfully urge that this Court should not so hold.

POINT V

Respondent did not violate Section 8(b)(1)(B) of the Act.

Respondent Picketed Wickham-Perone And Not The Wickham Half Of The Joint Venture.

The Administrative Law Judge found (J.A. 54) that three distinct business entities shared the same Pelham premises—Wickham Contracting Co., Inc., Ralph Perone, and Wickham Contracting Co. and Ralph Perone, Joint Venture. Wickham-Perone and Perone never were members of United Construction Contractors Association. The Board found that Respondent picketed Wickham illegally "as a separate entity and as part of a joint venture" (Brief, p. 21).

Respondent picketed two jobsites adjacent to each other, one of which proved to be a Wickham job and the other a Wickham-Perone job. The Administrative Law Judge

ruled that there was "no obligation on Biele's part, in the circumstances of this case, to have shown the Respondent documents identifying whose jobsites these were" (J.A. 53). Employees were shuttled from the Wickham payroll to the Wickham-Perone payroll and back, sometimes during the same week, and even the same day! (420-421)

While it is undisputed that only Wickham-Perone picket signs were used at the Wickham jobsite and at the adjacent Wickham-Perone jobsite (J.A. 52), the Administrative Law Judge credited the testimony of Anthony Biele that pickets at the Pelham office carried both Wickham and Wickham-Perone signs (J.A. 51). The Administrative Law Judge also credited generally the testimony of Anthony Biele's brother, Albert Biele; but ignored the fact that Albert Biele saw only Wickham-Perone signs during the picketing at the Pelham Office (J.A. 378). The Administrative Law Judge also credited Anthony Biele's testimony that none of his employees were on strike, but that these employees had merely quit their jobs and joined Respondent (J.A. 52). The Administrative Law Judge failed to explain what elements constituting a "strike" were lacking when employees left their employer's employ, joined a union and picketed. (See Misleading Statements, *supra* pp. 5-6).

The Board does not state whether the illegal act of picketing Wickham consisted of picketing premises where Wickham was located or of using Wickham picket signs. If the former, then how is half of a joint venture to be picketed? Has an employer a legal right to avoid picketing if it becomes half of a joint venture? If the illegality consists of the alleged use of Wickham signs, then we respectfully urge that this Court should deem unreasonable a finding that different picket signs were printed for adjacent jobsites, particularly since no one advised the Union that one of them was a Wickham project.

The practical significance of the Board's finding of violation of Section 8(b)(1)(B) is that a union may now

have reason to believe that it was picketing one entity, only to discover that it had picketed another entity, and be penalized therefor. Were an injunction the only penalty, a Court might well see little reason to desist from issuing an injunction which prohibited the picketing of Wickham and permitted the picketing of Wickham-Perone. This finding of violation of Section 8(b)(1)(B) has been added, however, to a Proposed Amended Complaint in the Section 303 action before Judge Frankel. A jury therefore could make an assessment of money damages based upon the alleged illegality of Respondent's picketing.

Assuming Arguendo That Respondent Picketed Wickham As Well As Wickham-Perone, The Picketing Was Lawful.

This case appears to constitute the Board's first attempt to use Section 8(b)(1)(B), which was enacted in 1947, to restrict recognitional picketing. Between 1947, when the Taft-Hartley Law was enacted, and 1959, no law explicitly restricted recognitional picketing. The Board nevertheless did not then construe Section 8(b)(1)(B) as applicable to recognitional picketing.

In 1959 Section 8(b)(7) was enacted for the express purpose of setting bounds to recognitional picketing. Respondent's picketing unquestionably does not violate Section 8(b)(7), hence is lawful.

The Board urges that (Brief, p. 34) Respondent's recognitional picketing nevertheless was unlawful because it was accompanied by the allegedly illegal objective of forcing Wickham "to abandon the bargaining agent of its choice", the Association. This argument is sheer sophistry. The Record is bare of any basis for reasonable inference that Respondent would not have been delighted to bargain with any agent of Wickham's choice, including Association. It is undisputed that Association would not have been willing to bargain with Respondent, or to bargain with any

union other than Teamsters Local 363. But that is Association's decision, not Respondent's.

Were Wickham not a member of the Association it is undisputed that Respondent's recognitional picketing would have been lawful. How can lawful picketing become unlawful, merely because the employer says "I want to be a member of an Assoication that refuses to bargain with you, therefore if you picket me you will be interfering with my choice of bargaining agent in violation of Section 8(b)(1)(B)?"

Following the Board's rationale, whether Wickham refused to withdraw from the Association, as occurred here, or joined the Association the day after the picketing commenced, would be irrelevant. This interpretation of Section 8(b)(1)(B) obviates the need for analysis of the failure of the Board to justify its finding that Wickham in fact had remained a member of Association. Suffice it to note that the Board has held that membership in this very Association expires upon expiration of each collective bargaining agreement and does not renew with respect to any employer unless and until he "executed a new application for membership", and that he is not a member of Association "until he signs that application form". *Atlas Electric Service Co.*, 176 NLRB No. 110. Such renewal did not occur here.

The Board's new, belated and peculiar construction of Section 8(b)(1)(B) constitutes nothing less than administrative reconstruction of an Act of Congress without any justification therefor in this Act's legislative history. We respectfully quote Senator Taft's analysis of Section 8 (b)(1)(B):

> "Mr. Taft: What are the new unfair labor practices on the part of unions? The provision starts on page 14 of the bill. First, it is provided that—
>
> It shall be an unfair labor practice for a labor organization or its agents—

1. To interfere with, restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

Last night David Lawrence, in a completely puerile analysis of the bill, referred to that as not meaning anything, and being something to fool the public.

This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.' This is the only section in the bill which has any relation to Nation-wide bargaining. Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes.

Mr. Fulbright: Mr. President, did the Senator say that that is the only provision which relates to industry-wide bargaining?

Mr. Taft: Yes, that is the only one." (Leg. Hist. of LMRA, 1947 at pp. 1011-12).

Clearly this Section applies only to a union's pressure upon an employer whose employees *that union* represents, for the purpose of changing the employer's representative, and does not apply when a question concerning representation exists. All the Board's decisions cited (Brief, p. 29, including Footnote 4 and p. 31, Footnote 6) are consistent

with Senator Taft's analysis of Section 8(b)(1)(B) and are not applicable here.

The Board's assertion that picketing is "beyond question" a *means* prohibited by Section 8(b)(1)(B) is not at issue. The issue here is Respondent's objective, not the means employed to implement the objective.

The Board suggests (Brief, p. 30) that forcing Wickham to quit the Association would have the effect of "forcing him to bargain on an individual basis" and is therefore illegal. Were Wickham's Association willing to bargain with Respondent on behalf of Wickham, such bargaining would have been on an individual basis in any event, because the Association's other members would not have bargained with Respondent. The Senate Report quoted by the Board reads:

> "Section 8(b)(1): This proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of collective bargaining or the settlement of grievances. Thus, a union or its responsible agents could not without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contract on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances." S. Rep. 105, 80th Cong. 1st Sess., P. 21.

The import of this Senate Report accords with Senator Taft's above-quoted analysis.

The Board further argues (Brief, p. 33) that "in any event Wickham could not lawfully withdraw from the Association at the time of the picketing", during the 13 month interim between the Board election covering the Associa-

tion-wide unit and the Board's certification of Teamsters Local 363, because "In such circumstances, an employer is required to refrain from recognizing any unit . . .". No Board decision and no Court decision holds, we believe, that during a period prior to the Board's certification any employer has an obligation to remain a member of any association.

Neither *Burke Oldsmobile* nor *Empire State Sugar* cited by the Board, involve association-wide bargaining units.

This Court has held that an employer may not quit his association after the association commences to bargain with a Union. (*NLRB* v. *Sheridan Creations, Inc.*, CA 2 1966, 357 F 2d 245) At the time of the picketing the Association's bargaining with Teamsters had not commenced and could not legally have commenced. Clearly, therefore, Wickham was not legally prohibited from quitting its Association at the time of the picketing.

Respondent may not legally engage in recognitional picketing today, because Teamsters Local 363 has now been certified to represent Wickham's employees. This case nevertheless is not moot because of the pending Section 303 damage suit.

We respectfully urge that this Court should hold that even if the Record justified the finding that Respondent picketed Wickham as well as Wickham-Perone, this picketing did not violate Section 8(b)(1)(B).

CONCLUSION

For the reasons stated, it is respectfully submitted that a judgment should be entered declining to enforce the Board's orders.

Dated: New York, New York, April 12, 1976.

Respectfully submitted,

MENAGH, TRAINOR & ROTHFELD

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376—Affidavit of Service by Mail

United States Court of Appeals
For the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

National Labor Relations Board
Petitioner

v.

Local 3, International Brotherhood of Electrical Workers AFL-CIO
Respondent

National Labor Relations Board
Petitioner

v.

Local 3, International Brotherhood of Electrical Workers AFL-CIO
Respondent

On Application for the Enforcement of Orders of the
National Labor Relations Board

State of New York, County of New York, ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is
agent for Menagh, Trainor & Rothfeld Esqs. the attorney
for the above named Respondent herein. That he is over
21 years of age, is not a party to the action and resides at 8 Mill Lane Levittowm, New York

That on the 7th. day of May , 1976, he served the within
Respondents Brief

upon the attorneys for the parties and at the addresses as specified below

National Labor Relations Board
Att: John Rother
Office of the General Counsel
Washington D.C. 20570

by depositing 2 true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 7th. day of May, 1976

Raymond J. Braddick

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977